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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re H.B., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. H.B., Defendant and Appellant.	D053287 (Super. Ct. No. J217992)

APPEAL from an order of the Superior Court of San Diego County, Lawrence Kapiloff and Francis M. Devaney, Judges. Affirmed.

H.B. appeals the juvenile court's order declaring her a ward of the court (Welf. & Inst. Code, § 602) after finding that she committed petty theft (Pen. Code, § 484), a misdemeanor, in a shoplifting incident. The court placed H.B. on probation with the following conditions: she reside with her mother and obey her mother's rules; she attend school full time, work full time or combine the two on a full-time basis; maintain an 8:00

p.m. curfew; complete 40 hours of community service; complete an anti-theft class; refrain from using drugs or alcohol; and complete a substance abuse treatment program, among other things.

H.B. contends the court erred by not excluding her statements that were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

FACTS

On Sunday, March 25, 2007, H.B. and some friends went to the Westfield North County Mall in Escondido. Michelle Amaya, the assistant manager of Icing by Claire's,[1] saw H.B. and one of her friends attempting to scratch out "skew" numbers on store tags and putting merchandise into their bags. Amaya waited until H.B. and her friends stepped out of the store and then told them to return to the store and empty their purses. There were more than 20 store items in H.B.'s and the other girl's bags. The items were valued at about $100. Amaya told the two girls they were "under arrest," and let the other girls leave. While she went back to work, Amaya directed a mall security guard to watch the girls until the police arrived. However, H.B. and the other girl left the store. Mall security guards pursed them through the mall parking lot. The girls entered the Red Robin restaurant and locked themselves in the restroom until H.B.'s mother and police arrived.

H.B. testified that the Friday before she had a birthday party at a restaurant and received numerous pieces of jewelry from Icing by Claire's as gifts because it is her

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1 Icing by Claire's is a store which caters to preteen and teenage girls. The store sells inexpensive costume jewelry and accessories.

favorite store. She also received a new purse and placed all of her jewelry in the new purse. When H.B. went to Icing by Claire's on Sunday, she intended to exchange some of her gifts. H.B. denied stealing any items from Icing by Claire's. When H.B. first entered the store, she did not tell store personnel that she had items to exchange.

On rebuttal, Escondido Police Officer Ryan Hicks testified that after H.B. was pointed out as "one of the accused," he "pulled her aside" and asked what was going on. H.B. told him that the items found in the purse were purchased by her mother a week earlier. H.B. did not mention that her friends had given her any of the jewelry. Hicks testified that he was questioning H.B. in an investigatory manner. Hicks did not admonish H.B. as to her *Miranda* rights before he questioned her. The court overruled defense counsel's *Miranda* objection.

DISCUSSION

H.B. contends the court erred by allowing Officer Hicks to testify about her statement to him because he did not advise her of her *Miranda* rights before questioning her, and the error was prejudicial. The contention is without merit.

It is settled law that a defendant's statements are inadmissible if they stem from a custodial interrogation unless the defendant was first advised of his or her *Miranda*

rights. (See *Berkemer v. McCarty* (1984) 468 U.S. 420, 428-429.)[2] Likewise, statements obtained from minors in violation of *Miranda* are inadmissible in juvenile proceedings held pursuant to Welfare and Institutions Code section 602. (*In re Roderick P.* (1972) 7 Cal.3d 801, 810-811.) The issue of custody is based on "whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125, quoting *Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) It is an objective test; the determinative factor is how a reasonable person in the suspect's position would have understood his or her situation. (*Berkemer,* at p. 442.)

Factors relevant in determining whether an interrogation is custodial are:

> "[W]hether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive,

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2 Under *Miranda*, the defendant must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda*, *supra*, 384 U.S. at p. 444.) This "prophylactic" rule of *Miranda* is designed to ensure the Fifth Amendment right against compulsory self-incrimination is protected. (*Michigan v. Tucker* (1974) 417 U.S. 433, 444, 446.)

> confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation." (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)

"[C]ourts [also] consider highly significant whether the questioning was brief, polite, and courteous or lengthy, aggressive, confrontational, threatening, intimidating, and accusatory." (*Id*. at p. 1164.) "No one factor is dispositive." (*Id*. at p. 1162.)

"[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. . . . *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " (*Oregon v. Mathiason*, *supra*, 429 U.S. at p. 495.) *Miranda* warnings are not required when a person is temporarily detained. (*People v. Farnam* (2002) 28 Cal.4th 107, 180.) "[T]he term 'custody' generally does not include 'a temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." (*Ibid*.; see also *Miranda*, *supra*, 384 U.S. at p. 477 ["General on-the-scene questioning as to facts surrounding a crime . . . is not affected by our holding"].)

We apply the following standard of appellate review: The determination of whether a suspect is in custody for purposes of *Miranda* is a mixed question of law and fact. As to the factual circumstances of the interrogation, we review the juvenile court's findings under the deferential substantial evidence standard. As to the issue of whether a reasonable person under those circumstances would have felt his freedom of movement

was restricted to the degree associated with formal arrest, we review the issue de novo. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

Hicks's questioning of H.B. was not a custodial interrogation. Many of the indicia of a custodial interrogation were not present. H.B. was not handcuffed; the police officer did not tell H.B. that she was under arrest or in custody; the questioning was brief; there were no other officers involved in the interrogation; Hicks was not aggressive, confrontational or accusatory; and no coercive interrogation techniques were used to pressure H.B. In short, the officer engaged in general on-the-scene questioning to determine what had happened while H.B. was detained. H.B.'s argument that the store personnel told her she was "under arrest" is unpersuasive. The issue is whether a reasonable person in H.B.'s shoes at the time she was questioned by Hicks would have believed she had been formally arrested or her freedom of movement had been restrained to the degree associated with a formal arrest.

Moreover, assuming arguendo that H.B.'s statement was obtained in violation of *Miranda* principles, the statement was properly admitted on rebuttal. (*Harris v. New York* (1971) 401 U.S. 222 (*Harris*); see also *People v. May* (1988) 44 Cal.3d 309.)[3]

In *Harris*, *supra*, 401 U.S. at page 224, the United States Supreme Court created an exception to the general rule of *Miranda*—namely, that while a statement taken without proper *Miranda* advisements is inadmissible in the prosecution's case-in-chief, it may be admitted for impeachment purposes. (Accord, *People v. May, supra,* 44 Cal.3d

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3 Pursuant to Government Code section 68081, we requested the parties file a supplemental brief on the applicability of *Harris* to this case.

309, 315.) *Harris* teaches that if a defendant elects to testify in his own defense, he or she is obligated to testify truthfully and will not be permitted to use the illegal method by which the prosecution obtained incriminating evidence to commit perjury. (*Harris*, at pp. 225-226.) "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id.* at p. 226.) We find *Harris* is dispositive.

H.B. acknowledges the rule of law set forth in *Harris*, but argues the rule is not applicable to this case because her statement to Officer Hicks was not proper impeachment as a prior inconsistent statement. Pointing out that on cross-examination she testified that she did not recall telling Hicks that *all* of the jewelry items were from her mother, H.B. claims her testimony was not inconsistent with her statement to Hicks that the jewelry was given to her by her mother. Rather, H.B. contends, her testimony was more in the nature of a failure of memory than an assertion of fact subject to impeachment. (See *People v. Green* (1971) 3 Cal.3d 981, 988 [normally, a witness's testimony that he does not remember an event is not inconsistent with that witness's prior statement describing the event].)

Preliminarily, we note that H.B. did not object on this basis below and therefore has forfeited the claim on appeal. (Evid. Code, § 353.) In any event, H.B. is mistaken. Her testimony about her friends giving her the jewelry on the previous Friday night was an assertion of fact that was subject to impeachment. The testimony was sufficiently factual in nature to justify impeachment with proof of a prior inconsistent statement to Officer Hicks.

A prior extrajudicial statement may be admitted if the statement is inconsistent with a witness's trial testimony. (Evid. Code, § 1235.)[4] Our Supreme Court has explained the rationale of the prior inconsistent statement as an impeachment tool:

> " 'The witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination was invented to explore. The reasons for the change of face, whether forgetfulness, carelessness, pity, terror, or greed, may be explored by the two questioners in the presence of the trier of fact, under oath, casting light on which is the true story and which the false. It is hard to escape the view that evidence of a prior inconsistent statement, when declarant is on the stand to explain it if he can, has in high degree the safeguards of examined testimony.' (2 McCormick on Evidence (4th ed. 1992) Hearsay Rule, § 251, p. 120, fn. omitted.)" (*People v. Zapien* (1993) 4 Cal.4th 929, 953.)

An inconsistent prior statement is fundamentally inconsistent with the witness's trial testimony. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219.) In *Johnson*, at pages 1219-1220, our Supreme Court explained that the rule of *People v. Green*, *supra*, 3 Cal.3d at page 988 is not applied mechanically. The test for admitting a witness's prior statement is inconsistency in effect rather than express contradiction. (*Johnson*, at p. 1219.) " '[T]he same principle governs . . . the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is

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4 Evidence Code section 1235 provides that, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides that, "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

implied." (*Ibid*.) "As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statement is proper." (*Id*. at pp. 1219-1220.)

H.B. was able to clearly recall the specifics about the shoplifting incident; her inability to recall was limited to her statements to Hicks. The court had the opportunity to view H.B.'s demeanor and therefore was in the best position to assess the credibility of her claimed nonrecollection. The court was entitled to view H.B.'s limited memory lapse with suspicion and conclude she was being evasive. We conclude there was a reasonable basis for the court's implied finding that H.B. was lying about her inability to recall, thereby justifying admission of her prior inconsistent statement to the officer under Evidence Code section 1235.

DISPOSITION

The order of wardship is affirmed.

IRION, J.

WE CONCUR:

MCINTYRE, Acting P. J.

O'ROURKE, J.